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IN THE

# Supreme Court of the United States

October Term, 1967
No. 1253

HANS KRAMM,
*Petitioner,*

*vs.*

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,
*Respondents.*

## Brief for Respondent in Opposition to Petition for Writ of Certiorari.

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WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,

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## Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Respondent, Workmen's Compensation Appeals Board of the State of California, respectfully submits its Brief in Opposition to the Petition for Writ of Certiorari filed by petitioner, Hans Kramm.

### Opinions Below.

On June 14, 1967, the Respondent Appeals Board issued its Order Denying Reconsideration (petitioner's Appendix "C") of its referee's findings (petitioner's Appendix "B"), thereby affirming the determination that petitioner's industrial injury caused no compensable disability.

Petitioner then timely filed a Petition for Writ of Review in the Court of Appeal, Fourth Appellate District, State of California, which was denied without opinion on October 26, 1967 (petitioner's Appendix "D"). He next filed a Petition for Hearing in the Supreme Court of the State of California which was denied without opinion on November 22, 1967 (petitioner's Appendix "E").

**Jurisdiction.**

The jurisdiction of this Court is invoked under 28 United States Code Section 1257(3).

Petitioner now asserts, for the first time, that the procedures established by the California Legislature for the adjudication, reconsideration and review of workmen's compensation cases have denied him the due process of law guaranteed in the United States Constitution, Amendment XIV, Section 1. He further urges, for the first time, that a denial of due process issue was presented by his contention below that the evidence in the record does not support the findings of fact.

It is the respondent Appeals Board's position that the courts of the State of California have correctly applied the controlling statutes and case law, which provide procedural due process and are not in conflict with the Constitution or laws of the United States. It is respectfully submitted that no Federal question is presented or exists and that the issue was not seasonably raised.

## Questions Presented.

1. Has the petitioner seasonably raised the due process issue?

2. Has the petitioner been denied due process by the California procedures for the adjudication, reconsideration, and judicial review of workmen's compensation cases?

3. Has the petitioner been denied due process by a failure of the record to support the findings of fact?

## Statutes Involved.

*California Labor Code* provides, in pertinent part, as follows:

> "*5900.* (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a referee under any provision contained in this division, may petition the Appeals Board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. . . ."
>
> "*5906.* Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or referee on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. . . ."

"*5907.* If at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking further testimony, the appeals board may affirm, rescind, alter or amend the order, decision, or award made and filed by the appeals board or referee and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case."

"*5950.* Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the orignial order, decision, or award or of the order, decision, or award following reconsideration. . . ."

"*5951.* The writ of review shall . . . direct the appeals board to certify its record in the case to the court within the time therein specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the record of the appeals board, as certified to by it."

"*5952.* The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:

"(a) The appeals board acted without or in excess of its powers.

"(b) The order, decision, or award was procured by fraud.

"(c) The order, decision or award was unreasonable.

"(d) The order, decision, or award was not supported by substantial evidence.

"(e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

"Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."

"*5954.* The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable, apply to proceedings in the courts under the provisions of this article. . . ."

*California Code of Civil Procedure* provides, in pertinent part, as follows:

"*1070.* Direction and Return of Writ—The Writ [of review] may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required."

"*1071.* Form and Contents.—The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ . . . a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court. . . ."

## Statement of the Case.

Petitioner was employed as a bricklayer by respondent Straightline Masonry Company. He testified that on August 26, 1965, he was building a chimney when he felt pain in his right leg as he stumbled picking up a flue-liner, and in his low back as he put the flue liner into the chimney.

Petitioner suffered other industrial injuries in November, 1964, and November, 1965, which he promptly reported to his employer, but he did not mention the incident in question to his employer until the spring of 1966.

Petitioner continued working regularly, with no time off, until December, 1965, when he lost two weeks because no work was available.

He thereafter worked without interruption until June 22, 1966.

Petitioner first sought medical treatment for his back in January, 1966, when he saw a Dr. Kimball, whose records show no history of an alleged work-connected injury. Dr. Kimball reported that he was treating the petitioner for "degenerative disc L-4 with sciatica."

Back surgery was performed by a Dr. DuVigneaud who first saw the petitioner on June 23, 1966, ten months after the injury. Dr. DuVigneaud testified that his review of Dr. Kimball's records indicated a back aggravation about a week prior to January 11, 1966. Although he found nothing inconsistent with in-

dustrial injury, Dr. DuVigneaud could not unqualifiedly confirm a causal relationship between the work and the subsequent treatment, and he indicated that it was not likely that the patient would delay 4½ months before seeking medical attention.

Following the receipt of testimony at two hearings and the admission of offered evidence, the referee ordered the case submitted on February 14, 1967.

The Opinion of Referee on Decision was prepared on April 21, 1967, finding that, "The evidence supports a finding that applicant did sustain an injury arising out of and occurring in the course of his employment to his right leg and low back on August 26, 1965, that resulted in no temporary disability or residual permanent disability."

The Findings and Award (petitioner's Appendix "B") were accordingly issued by the referee on April 27, 1967.

Petitioner then petitioned the Appeals Board for Reconsideration of that decision, urging that the evidence warranted a finding of industrial disability.

The Appeals Board had before it the entire record of the proceedings held before the referee, including the evidence submitted and the referee's summaries of all testimony taken. The petitioner did not seek the reporter's transcripts of the testimony, which were available on order, nor did he object to the accuracy or completeness of the referee's summaries hereof.

On June 14, 1967, the Appeals Board filed its Order Denying Reconsideration (petitioner's Appendix "C"), affirming the referee's findings.

On July 13, 1967, the petitioner filed a Petition for Writ of Review in the Court of Appeal of the State of California, Fourth Appellate District, Division One.

Although variously stated, the petition was based upon the sole contention that there was no substantial evidence to support the Appeals Board's findings of fact, and he thereby became obligated by the requirement of *Rule 57(a)* of the California Rules of Court which provides that if on review ". . . it is claimed that the decision is not supported by substantial evidence, the petition must fairly state all the material evidence relative to the point at issue." The petitioner attached as exhibits the trial referee's summaries of testimony, the medical records of Dr. Kimball and the medical report of Dr. DuVigneaud, but petitioner neither sought transcripts of the testimony nor did he object to the contents of the referee's summaries.

Furthermore, petitioner did not file a reply brief, with the Court of Appeal, to challenge either the accuracy or the completeness of the respondent's presentation of the factual support for the Appeals Board's decision, which he had a right to do. (*Rule 57(b), Calif. Rules of Court.)*

Upon denial of the Petition for Writ of Review, the petitioner filed a Petition for Hearing in the Supreme

Court of the State of California. Therein petitioner also took the additional position that the Court of Appeal was obligated to issue the writ based upon the petitioner's allegations as to what the factual determinations should have been.

Petitioner implied that because the weight of the evidence supported his view of the facts rather than the view adopted by the Appeals Board, that to require the presentation of a more persuasive case would be a denial of due process. This argument seemed to urge that the issue before the Court of Appeal should have been whether the findings of fact were supported by the weight of the evidence rather than whether they were supported by substantial evidence.

No challenge was made to the Constitutionality of the California workmen's compensation system or to the extent of judicial review available.

On November 22, 1967, the Petition for Hearing in the California Supreme Court was denied without opinion.

## ARGUMENT.

The respondent Workmen's Compensation Appeals Board of the State of California respectfully submits that the controlling California statutes and case law as applied to this case effected no violation of Constitutional requirements, and that petitioner has not seasonably raised the issue.

### I.

### Petitioner's Failure to Present Specifically a Substantial Federal Question in the Courts Below Bars Him From Now Invoking the Jurisdiction of This Court.

The question of the validity of state law on the ground of its being repugnant to the Federal Constitution must first be "drawn in question" before the highest court of the state in order to invoke the jurisdiction of the United States Supreme Court. (*Roller v. Murray* (1914), 234 U.S. 738, 58 L. Ed. 1570; *Wilson v. Cook* (1946), 327 U.S. 474, 90 L. Ed. 793).

Although the petitioner challenged the reasonableness of the adverse factual findings below, he has at no prior time specifically challenged the validity of the California Statutes and case law under which those determinations were made. Petitioner explains his failure to do so on the grounds that it would be inappropriate because the local statutes and rules of court do not provide for it. That position is clearly unsound. State statutes need not be enacted with built-in procedures for raising constitutional issues in order to be subject to challenge. Such a requirement would destroy the effectiveness of any judicial consideration of constitutional issues since it could be barred by simply not providing for it in the rule or statute.

Petitioner's sole reference to due process below is the following comment contained in his Argument to the Supreme Court of California (Pet. for Hear. p. 11, lines 8 to 11):

> "The question presented is whether, on this state of facts, the Applicant could, consistent with due process, have been required to carry any greater burden of proof."

It is respectfully submitted that the state high court would not thereby be apprised that its judgment, and the validity of the state's entire workmen's compensation system, were being assailed on Federal grounds, as is required. (*Wilson v. Cook, supra.*)

## II.

## The California Law Governing the Adjudication, Reconsideration, and Judicial Review of Workmen's Compensation Matters, as Applied in This Case, Complies With the Due Process Requirements of the Constitution and Laws of the United States.

Petitioner concedes that he was granted ample opportunity to present evidence, both documentary and in the form of testimony at the trial level. His argument is directed toward the review and appeal procedure.

Due process exists if there is opportunity to be heard at any time before final judgment. (*Wilson v. Standifer,* 184 U.S. 399, 46 L. Ed. 612). Clearly that opportunity was provided in this case. Beyond that, the complained of reconsideration and judicial review procedures were also afforded.

First, reconsideration was sought under the provisions of *California Labor Code Sections 5900 to 5911,*

which provide for filing a petition to the Appeals Board wherein the petitioner may set out at length the alleged errors of the trial referee in finding the facts or applying the law. The Appeals Board has before it the entire record of the proceedings as conducted before its referee. Either party may have transcripts of the testimony prepared and made a part of the record. The referee's summaries of the testimony are prepared and served on the parties prior to or concurrently with the decision and are a part of the record. Either party is free to object to the completeness or accuracy thereof. No such objection was made by petitioner nor did he request that transcripts be prepared, although the entire proceedings was recorded by a Hearing Reporter, with qualifications equal to a Court Reporter.

The responsibility of the Appeals Board on reconsideration has been defined by California case law as the obligation to achieve a substantial understanding of the record and this may be done by reference to the referee's summaries of the testimony when it is not claimed that the summary is in error (*Allied Comp. Ins. Co. v. Ind. Acc. Com.,* 57 Cal. 2d 115).

Following the decision of the Appeals Board, Denying Reconsideration, petitioner was in position to seek the aid of the courts.

Judicial review of the decisions of the Workmen's Compensation Appeals Board is provided for in *California Labor Code Sections 5950 to 5956,* whereby any person affected by an action of the board may apply to the Court of Appeal for a writ of review (*i.e.,* Certiorari per *Calif. Code of Civil Procedure Section 1067*).

The petitioner may present transcripts to the Court as a part of the Petition for Writ of Review. He may, and herein was obligated under *Rule 57(a)* to present all material evidence relevant to the point at issue to the Court so that it could determine if there is good cause to issue the Writ.

Petitioner sought review in due course and incorporated in his petition the referee's summaries of testimony as well as other documents and relevant evidence. He did not then or later object to the accuracy or completeness of the summaries, nor did he seek transcripts.

Since the petitioner demonstrated no reason for the Court of Appeal to believe that an error of law might have been committed, the writ was denied without opinion.

Had the Court found reason to consider the case beyond the matters presented by the briefs, and the writ issued, the Appeals Board would have been ordered to certify the entire record to the Court (*Labor Code Section 5951*), in accordance with the statutory requirement. It has been the practice of the Appeals Board, and its predecessor the Industrial Accident Commission, then to prepare and certify transcripts of all hearings, including those not previously prepared, since they may be required under the provisions of *Calif. Code of Civil Procedure Sections 1070 and 1071.*

California procedure permits further review by way of a Petition for Hearing in the California Supreme Court, which was filed in this case. The petitioner was obligated to present a fair statement of the evidence for the court's consideration, therein, as he was in the Court of Appeal (*Rule 57(a), Calif. Rules of Court*).

Since that Petition for Hearing was denied without opinion, the California Supreme Court clearly found no fault with the prior proceedings and no cause to review the matters presented to it.

The petitioner's objection below was to the findings of fact and his contention herein under the due process clause of the 5th Amendment refers to the manner in which the findings of fact were made.

Petitioner's attack upon the established California statutory method of reconsideration and judicial review of workmen's compensation cases is based upon the contention that the law precludes the Appeals Board and the courts from consideration of the entire record, including transcripts of the testimony.

As demonstrated, that basic contention is unsound, and, on the contrary, the entire record, as developed by the parties, is before the Appeals Board, and is presented to the courts in response to the writ of either court. The extent of the evidence presented in the Petition for Writ of Review or Hearing is the responsibility of the petitioner (*Rule 57(a), Calif. Rules of Court*).

The Appeals Board's review of the entire record includes the summaries of testimony prepared by the referee prior to his decision and any transcripts requested by the parties.

The court's decision whether a writ should issue is based upon the pleadings, that is, the record supplied to it by the parties. There is nothing to suggest that

either the Court of Appeal or the Supreme Court denied hearings except on the merits of the petition.

It is a common and necessary practice ". . . of the courts to determine upon the face of a pleading what action should be taken upon it." (*Napa Valley Elec. Co. v. Board of Railroad Commissioners,* 251 U.S. 366, 40 S. Ct. 174, 64 L. Ed. 310).

Since there has been due notice, proper opportunity to be heard, and the findings are based on evidence, the use of the fact-finding method here employed, is a procedure to be sustained against due process objections. (*Crowell v. Benson* (1932), 52 S. Ct. 285, 285 U.S. 22.)

The denial of the writ by the Appellate Courts is an affirmation that the board acted within its authority. The absence of an opinion by the court does not effect the quality of decision or efficacy of its judgment. (*Napa Valley Elec. Co. v. Board of Railroad Commissioners, supra*).

III.

**The Record Sustains the Findings of Fact and Petitioner Has Not Been Denied Due Process by a Failure of the Evidence to Support Them.**

The California statutory requirement *Labor Code Section 5952(d)* is that an order, decision, or award of the Appeals Board must be supported by substantial evidence and no judicial inquiry will be made into the weight of the evidence. The substantial evidence rule has been defined in many cases, including *Douglas*

*Aircraft, Inc. v. Ind. Acc. Com.* (*MacDowell*), 47 Cal. 2d 903, 905, where the California Supreme Court said:

> "When a finding of fact of the Industrial Accident Commission is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact." (Emphasis the court's.)

It appears clearly that there was substantial evidence to support the factual determination that petitioner's injury did not cause the extensive disability and need for medical treatment alleged.

The petitioner did not report this injury to his employer, although he reported others. He continued working without loss of time or medical attention. He gave no history of industrial injury to Dr. Kimball, who treated him for a degenerative disc and not an injury. Dr. DuVigneaud considered it likely that an injury occurred in January, 1966, and did not think it likely that petitioner would wait four and one-half months after an injury to seek medical treatment.

Petitioner now contends in substance, that to base the findings of fact on substantial evidence, rather than on a weight of the evidence rule, is denial of due process, even without demonstrating that the weight of the evidence is contrary.

To ask the adoption of such a rule is to ask the reviewing court to consider the probative effect of the evidence and make independent findings of fact. Due process neither requires nor contemplates that a re-

viewing court assume this task or that there exist any review procedure beyond insuring the proper application of the law. (*Crowell v. Benson, supra; Dennis v. Denver & R.R.W.R. Co.*, 84 S. Ct. 291, 375 U.S. 208, 11 L. Ed. 2d 256.)

**Conclusion.**

Respondent Appeals Board submits that there has been no violation of due process requirements and that petitioner has failed seasonably to present any Federal question.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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